New India Assurance Co. Ltd. Vs Pamula Bala Prabhavatamma and Others

Court: Andhra Pradesh High Court

Date of Decision: March 9, 1989

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 41 Rule 27

Citation: (1990) ACJ 547 : (1990) 2 AnWR 169 : (1991) 72 CompCas 206

Hon'ble Judges: K.R. Ramaswamy, J

Bench: Single Bench

Advocate: Kote Subba Rao, for the Appellant; S. Hanumaiah, for the Respondent

Judgement

1. The appellant herein-the New India Assurance Company Limited-is resisting the claim for a sum of Rs. 1,40,000 awarded by the Tribunal

below as against the claim of Rs. 3,20,000 to the respondents-claimants, who are the widow, minor daughters and major son of the deceased P.

Bala Muni Reddy aged about 48 years. The deceased was an employee of the Gram Panchayat drawing a monthly income of Rs. 1,440. At about

7.50 a.m. on February 5, 1984, he was knocked down by bus No. APD 3711 on a bridge near Cuddapah town and the deceased died on the

spot. As a result, the respondents-claimants laid the claim. The court below recovered the finding that the death of the deceased was due to rash

and negligent driving of the vehicle No. APD 3711. This finding is based on direct evidence. Accordingly, I confirm that the death had occurred as

a result of the rash and negligent driving of the vehicle by the driver.

2. The only point that arises for consideration in this appeal is about the liability of the assurance company (appellant).

3. The contention of Sri K. Subbarao, learned counsel appearing for the appellant is that in paragraph 7 of the counter it was pleaded by the

company that the appellant is liable only as per the policy. No attempt was made by the respondents (claimants) to have the policy filed in the court

below. Therefore, by operation of the provisions of section 95 of the Motor Vehicles Act, 1939 (4 of 1939) (for short ""the Act""), the liability of

the appellant should be limited to Rs. 50,000. The court below has committed a grievous error in awarding a sum of Rs. 1,40,000 as against the

assurance company. It is stated that the appellant filed before this court the policy along with the memorandum of grounds of appeal and the

clauses therein disclose that the maximum liability is Rs. 50,000. This claim was resisted by Sri S. Hanumaiah, the learned counsel appearing for

the claimants, contending that the policy now filed in the court cannot be received as evidence. Unless the appellant satisfies the requirement of

Order XLI, rule 27 of the CPC showing the grounds on which the appellant could not file the policy in the court below and unless this court finds

that it is absolutely necessary for the purpose of deciding the point, it cannot be received as additional evidence. It is further contended that in

column 17 of the claims statement, the claimants have specifically mentioned the name and address of the insurer. Beyond that it is not expected of

the claimants to mention the details of the policy because it is not within their knowledge. Therefore, their claim cannot be rejected on the ground of

want of material particulars. As regards the policy, it is the duty of the assurance company (appellant) to mention all the particulars in their counter

and their non-liability is to be established not only by pleading but also by producing the policy and other evidence. In this case, no such attempt

has been made. Therefore, there is no illegality in the award passed by the Tribunal below awarding the amount in question. It is also stated that

they filed cross-objections for the balance amount.

4. The first question, therefore, is whether the amount awarded by the court below is just, fair and reasonable for the loss of dependency.

Admittedly, the deceased was drawing a salary of Rs. 1,440 per mensem at the time of the accident and he was aged about 48 years and he

would be in service for ten years more. Therefore, what will be loss of his earnings for ten years and thereafter his pensionary benefits. In this case,

the court below has taken all the facts and circumstances into consideration and awarded a sum of Rs. 1,40,000 in total. Having regard to the facts

and circumstances of this case, I find that the amount awarded by the court below for the loss of dependency is just and fair and there is no

illegality in awarding the said amount.

5. The next question is whether the assurance company (appellant) is liable to the entire extent of the amount. It may be true that the liability of the

appellant has been limited to the policy under which the insurer has undertaken to indemnify under the contract of insurance to the extent of

damage suffered and likely to be paid to the third parties for the death or bodily injuries to the victims or damages to the vehicle. But in column No.

17 of the claims statement, an obligation is cast on the claimants to specify the name and address of the insurer. This obligation has been

discharged by the claimants. As the nature of the policy, the liability and the contract undertaken thereunder are within the knowledge of the insurer

as well as the owner of the vehicle, the claimants are not expected to make detailed investigation in this regard and specify the same in the claims

statement when the insurer has been impleaded as a party-respondent. It is the duty of the insurer to plead and prove the extent of the liability

undertaken under the policy. Except pleading that the insurer is not liable, no further particulars have been given in this regard. Therefore, the

Tribunal below is well justified in fastening the liability on the insurer as well. It is no doubt true, as relied upon by Sri K. Subbarao, that in Desraj

and Others Vs. Ram Narain and Others, , the Division Bench of the Allahabad High Court, speaking through H. N. Seth J., has held that ""the

Tribunal while determining the amount payable u/s 110C, in view of the provision contained in section 95(2) of the Act, presumed that the

insurance company must have in any case covered the risk up to the statutory limit mentioned therein and in the absence of insurance policy it can

safely direct payment of such an amount by the insurance company. If, however, any person claims that under the contract of insurance, the

insurance company had undertaken to indemnify the insured for a larger sum he has to keep the policy available for perusal to the Tribunal. In the

absence of the insurance policy and without perusing the same, the Tribunal could not fix any liability higher than that mentioned in section 95 of the

Act."" That was a case where the insurance company has specifically pleaded that its liability is only to the extent mentioned u/s 95(2) and,

therefore, the Division Bench has held that, if any liability in excess thereof is to be proved, the burden is on the claimants to establish the same.

The learned counsel also relied upon a decision in Fatik Chandra v. Milak Baroi AIR 1980 Gauhati 73, wherein the learned judges appear to have

received at the appellate stage the policy, not marked during the trial, relied upon by learned counsel. But I find it difficult to accept the ratio therein

in view of the rigour imposed by Order 41, rule 27 of the Code of Civil Procedure. But in General Assurance Society Ltd. v. Avtar Singh (1987)

62 Comp Cas 218, the Division Bench of the Punjab and Harayana High Court, speaking through Prem Chand Jain C.J. has held that the

insurance company did not take any plea nor did it lead any evidence before the Tribunal to show that its liability was only to the extent of Rs.

50,000. The insurance company cannot take any benefit of the averment made by the insured in the grounds of appeal or in the application,

especially when it has failed to take any plea or lead any evidence on this aspect of the matter. This ratio is in consonance with the view I have

expressed hereinbefore and I respectfully agree with the ratio. A Division Bench of this court, of which I was a member, held that it is for the

insurance company to fill up the relevant columns pleading extent of its liability and in its absence, the limitation prescribed u/s 95(2) cannot be

applied and the entire liability has to be borne by the insurance company. In view of this ratio, I have no hesitation to hold that the appellant is liable

to the entire extent.

6. The question then is whether the insurance policy can be received as evidence in the appeal. Order 41, rule 27 of the CPC provides that the

parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But, if the court from

whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or the party seeking to produce additional

evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise

of due diligence, be produced by him at the time when the decree appealed against was passed or the appellate court requires any document to be

produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellate court may allow such

evidence or document to be produced, or witness to be examined. Whatever additional evidence is allowed to be produced by an appellate court,

the court shall record the reason for its admission. Thereby, it is mandatory that the appellate court shall not receive additional evidence either oral

or documentary as a matter of course. It is for the parties to an appeal to satisfy that either the trial court has refused to admit the evidence which

ought to have been admitted or that, notwithstanding the exercise of due diligence, the evidence which is sought to be produced was not either

within his knowledge or could not, after exercise of due diligence, be produced before the trial court or the document produced is required by the

court with a view to render justice or for any substantial cause the appellate court may receive evidence. But, when receiving such evidence, the

appellate court shall give reasons for it. Thereby, it is mandatory on the part of the appellant to satisfy any of these requirements. Except stating that

there was correspondence between the appellant''s branches, no other reason has been assigned. For well over two years, the proceedings were

pending before the court below and no attempt was made to produce the policy in the Tribunal below. The insurance policy was produced only for

the first time after the liability was mulcted by the Tribunal below to the entire extent. In those circumstances, I am satisfied that the appellant has

not established the requirements mentioned in order 41, rule 27 of the Code of Civil Procedure. Therefore, I cannot receive this document as

additional evidence. Having regard to the facts and circumstances of the case, the total liability imposed by the Tribunal below is not vitiated by any

error of law warranting interference by this court.

7. The appeal is, accordingly, dismissed. No costs.

8. The claimants are, however, entitled to interest at the rate of 12 per cent. from the date of the petition till the date of realisation. This order does

not preclude the appellant from proceeding against the owner, if the liability is against the owner, as per law.